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No. 02-750

In The
Supreme Court of the United States

ROGERS MACHINERY COMPANY, INC.
Petitioner,

v.

WASHINGTON COUNTY AND CITY OF TIGARD,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of Oregon

BRIEF OF DEFENDERS OF PROPERTY RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Nancie G. Marzulla*
DEFENDERS OF PROPERTY RIGHTS
1350 Connecticut Ave., NW
Suite 410
Washington, DC 20036
(202) 822-6770

December 15, 2002 *Counsel of Record for *Amicus Curiae*

21 pp

QUESTION PRESENTED

Amicus curiae will address the following issue presented for review:

Must a traffic impact fee, imposed by a local government as a condition of a development permit, be "roughly proportional" to the impact of the proposed development under the Fifth Amendment?

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Pursuant to Rule 37.3 of the Rules of this Court, *amicus curiae* submits this brief in support of petitioner.[1] Both parties have consented to the filing of this brief.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Defenders of Property Rights is a non-profit, public interest legal foundation dedicated to the preservation of constitutionally protected property rights. Defenders' mission is to protect those rights considered essential by the Framers of the Constitution and to promote the exercise of governmental power consistent with the constitutional limitations upon the exercise of that power. Defenders' goal of the vigorous protection of property rights recognizes the special role of federal courts in protecting those rights. Since its founding in 1991, Defenders has participated in every significant property rights case in this Court including *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, ___ U.S. ___, 122 S. Ct. 1465 (2002);

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[1] No counsel for either party authored this brief *amicus curiae*, either in whole or in part. Furthermore, no persons other than *amicus curiae*

Palazzolo v. Rhode Island, 533 U.S. 606 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Bennett v. Spear*, 520 U.S. 154 (1997); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Keene Corp. v. United States*, 508 U.S. 200 (1993); and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

STATEMENT OF THE CASE

Petitioners, Rogers Machinery Company, Inc. ("Rogers"), planned to construct a new corporate headquarters in Tigard, Oregon. Rogers applied with the respondent, the city of Tigard ("city"), for a building permit for the new headquarters. After reviewing the permit application and other materials relating to the proposed development, the city assessed Rogers a traffic impact fee of

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contributed financially to the preparation of this brief.

$37,102 pursuant to Washington County Code § 3.17, a fee assessed against property developers to provide funds for improvements to city streets and arterials. *See Rogers Machinery Company, Inc. v. Washington County,* 45 P.3d 966, 967 (Or. Ct. App 2002). Rogers ultimately payed but challenged the fee in the state circuit court, asserting that the traffic impact fee violated the Just Compensation Clause of the Fifth Amendment. The circuit court dismissed the challenge, characterizing the fee as a tax not subject to a Just Compensation claim. The Court of Appeals of Oregon affirmed the circuit court's decision, but characterized the fee as a legislatively imposed monetary exaction not subject to heightened takings scrutiny under *Dolan v. City of Tigard*, 512 U.S. 374 (1994). *See Rogers Machinery Company, Inc.*, 45 P.3d at 983. Petitioner now seeks review from this Court.

SUMMARY OF ARGUMENT

This Court held in *Dolan* that conditions that local or state governments place on the approval of a development

permit (referred to as exactions hereinafter) had to be "roughly proportional" to the impact of the proposed development to pass muster under the Just Compensation of the Fifth Amendment:[2]

> We think a term such as 'rough proportionality' best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the proposed development.

Dolan, 512 U.S. 374, 391 (1994).

This case raises the issue of whether the "rough proportionality" standard articulated in *Dolan* applies to monetary exactions imposed legislatively by local governments. Lower courts are in disarray over how to apply the rough proportionality test. One dispute is over the issue of whether exactions, monetary or otherwise, adopted in a legislative context are subject to the rough proportionality test.

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[2] "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

A number of lower courts have applied *Dolan* to legislatively adopted exactions. *See, e.g., Northern Illinois Homebuilders Association v. County of DuPage*, 649 N.E.2d 384 (Ill. 1995); *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995); *Home Builders Association of Dayton and the Miami Valley v. City of Beavercreek*, 729 N.E.2d 349 (Ohio 2000); *Schultz v. City of Grants Pass,* 884 P.2d 569 (Or. 1995); *Benchmark Land Co. v. City of Battle Ground*, 14 P.3d 172 (Wash. 2002). Other courts have declined to extend *Dolan* beyond the realm of adjudicative exactions. *See, e.g., Home Builders Association of Central Arizona v. City of Scottsdale*, 930 P.2d 993 (Ariz. 1997), *cert. denied*, 521 U.S. 1120 (1997); *San Remo Hotel, L.P. v. City and County of San Francisco*, 41 P.3d 87 (Cal. 2002); *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996), *cert. denied*, 519 U.S. 929 (1996); *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 698 (Colo. 2001).

In addition, there is also confusion among lower courts as to whether *Dolan* applies to monetary exactions. Some lower courts have declared that *Dolan* only applies to physical dedications, not to monetary exactions. *See, e.g., Clajon Products Corp. v. Petera*, 70 F.3d 1566, 1578 (10th Cir. 1995); *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872, 875-76 (9th Cir. 1991), *cert. denied*, 504 U.S. 931 (1992); *McCarthy v. City of Leawood*, 894 P.2d 836 (Kan. 1995). Other courts have indicated that heightened takings scrutiny could extend to monetary exactions, but only to those imposed on an adjudicative basis. *See, e.g., Home Builders Ass'n of Central Arizona*; *San Remo Hotel; Ehrlich*; *Krupp*; *Town of Flower Mound v. Stafford Estates Ltd. Partnership*, 71 S.W.3d 18, 30-31 (Tex. App. Feb. 14, 2002).

This uncertainty in *Dolan*'s applicability to the context of monetary exactions imposes a significant burden on property owners and local governments. Local governments often use these fees to spread infrastructure

expenses. At the same time, these fees significantly burden property owners operating small and emerging businesses who want to develop their property, but who are not as financially well-equipped to pay such fees as larger businesses are. *See* James L. Huffman & Elizabeth Howard, *The Impact of Land Use Regulations on Small and Emerging Businesses*, 5 J. SMALL & EMERGING BUS. L. 49, 68 (2001) ("A large business has essentially the same cost of compliance as a small business, while generating significantly more resources that can be used to pay that cost").

Assessment of such fees without a constitutional limit such as rough proportionality chills the constitutionally protected right to make reasonable and beneficial use of property if such fees are prohibitively costly. As this Court has stated, "the right to build on one's own property cannot remotely be described as a 'governmental benefit.'" *Nollan v. California Coastal Commission*, 483 U.S. 825, 833 n. 2 (1987).

Furthermore, the Court should address the lower courts' collective uncertainty as to whether *Dolan* applies to exactions, monetary and otherwise, adopted legislatively because of the peculiar nature and structure of local governments. Property owners and developers routinely find themselves at the mercy of greedy local decision makers, with no procedural safeguards against excessive fees, but for the constitutionally guaranteed right to property right protections. *See* WILLIAM FISCHEL, REGULATORY TAKINGS at 289-324 (1995). There is "no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation . . ." *Dolan,* 512 U.S. at 392.

REASONS FOR GRANTING THE PETITION

I. The Court Should Address This Important Constitutional Question: Does *Dolan* Apply to Legislative Exactions?

In his dissent from this Court's denial of certiorari in *Parking Association of Georgia, Inc. v. City of Atlanta*, 450 S.E.2d 200 (Ga. 1994), *cert. denied*, 515 U.S. 1116 (1995), Justice Thomas dismissed the legislative-versus-adjudicative distinction as constitutionally irrelevant in a regulatory takings analysis:

> It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking . . . Moreover, the general applicability of a the ordinance should not be relevant in a takings analysis . . . The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.

Parking Ass'n of Georgia, 515 U.S. at 1116.

This constitutional distinction between legislative and adjudicative exactions is premised on the supposed relatively "heightened risk of extortion" in the context of adjudicative

exactions. *See Ehrlich,* 911 P.2d at 444. As petitioners correctly point out, the risk of extortion results from an inequity of bargaining power, which is greatest at the time when an applicant seeks a development permit from the local government that has the power to permit the applicant's development. *See* Petitioners Brief at 14. Thus, whether the exaction is imposed pursuant to a legislative formula or in an adjudicative setting is irrelevant to the applicant.

As economist William Fischel has observed, owners of undeveloped land are particularly susceptible to confiscatory regulatory behavior on the part of local governments. *See* WILLIAM FISCHEL, REGULATORY TAKINGS at 101, 133, 289-324 (1995). Such owners often lack the ability to exit the locality, and the legislative structure of local governments simply does not allow for the logrolling and pressure by special interests that would afford developers adequate protection from being charged excessive exactions. *See id.* at 289-324.

In fact, many local governments enact ordinances affecting property owners in fora that do not afford property owners the benefit of a public hearing. *See, e.g.,* Amy C. Brandt, Comment, *Sedona's Sustainable Growth Ordinance: Testing the Parameters of Dolan v. City of Tigard*, 28 ARIZ. ST. L. J. 1297, 1329 (1996).

For example, the city of Sedona, Arizona adopted a growth management ordinance by initiative, rather than through hearings that would have allowed for representative decision-making and deliberation between competing interests:

> Sedona residents . . . passed a growth management ordinance severely restricting the property rights of some owners of undeveloped parcels. Many of the traditional safeguards usually present in legislative action, like the rigors of public hearings, were not present in this case. Indeed, the ordinance was even called a 'mystery.'

Id. (citing Joani Knowles, *Mystery Growth Initiative May See Daylight*, SEDONA RED, Dec. 1, 1995, at 1A).

This distinction articulated by the case law would allow local governments to improperly circumvent the rough proportionality requirement of *Dolan* without affording procedural safeguards to property owners.

II. This Issue Is Enormously Significant for Landowners Because Such Exactions Tremendously Burden Their Ability to Use and Develop Their Property.

Monetary exactions like the fee at issue impact the rights of property owners and developers as significantly as pure possessory exactions do. Many local governments have begun to employ impact fees in conjunction with development permits with greater frequency as an alternative to taxation and to circumvent *Dolan*. *See, e.g.*, James L. Huffman & Elizabeth Howard, *The Impact of Land Use Regulations on Small and Emerging Businesses*, 5 J. SMALL & EMERGING BUS. L. 49, 65-66 (2001) ("Local governments have a tendency to abuse their power to impose exactions on property owners . . .[S]tate and local governments continue to expand exactions and resist compliance with the Supreme

Court's rulings"); Ann E. Carlson & Daniel Pollak, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions*, 35 U.C. DAVIS L. REV. 103, 107 (2001) ("[T]he *Nollan* and *Dolan* cases appear to encourage many jurisdictions to shift away from demanding land exactions from developers and towards imposing fees"). Their increased usage merits constitutional scrutiny, lest local and state government run roughshod over the rights of property owners to develop and use their property.

Monetary exactions have a disproportionate impact on small businesses eager to develop their property. As one commentator has observed, the costs of doing business "vary with the size and number of a business' activities, [but] costs associated with compliance with most regulations [i.e. monetary exactions] are relatively fixed." James L. Huffman & Elizabeth Howard, *The Impact of Land Use Regulations on Small and Emerging Businesses*, 5 J. SMALL & EMERGING BUS. L. 49, 68 (2001). These fixed costs of regulatory

compliance are relatively more acute for small and fledgling business because larger businesses generate "significantly more resources that can be used to pay that cost." *See id.* These obstacles can prevent or deter a small business' entry into the marketplace, and thus, the use of their property: "Because land use regulations usually involve permitting, . . . most of the compliance costs are borne before a project can be launched." *See id.* Providing some limit to these fees would relieve small businesses of this burden and permit economic use of their property.

Application of a limit like rough proportionality to monetary exactions would neither eliminate their use nor prove impracticable. Impact fees are readily amenable to application of the rough proportionality standard. *See* Amy C. Brandt, Comment, *Sedona's Sustainable Growth Ordinance: Testing the Parameters of Dolan v. City of Tigard*, 28 ARIZ. ST. L. J. 1297, 1323 ("[C]ities can readily quantify the costs of the proposed development and charge an impact fee accordingly"). Application of the rough

proportionality standard to such fees would simply limit the fees charged, not eliminate their use as a way to mitigate the impact of property development.

CONCLUSION

Accordingly, for all the foregoing reasons, *amicus curiae* strongly urges this Court to grant the requested Petition for Writ of Certiorari.

Respectfully submitted,

Nancie G. Marzulla*
DEFENDERS OF PROPERTY RIGHTS
1350 Connecticut Ave., NW
Suite 410
Washington, DC 20036
202-822-6770

December 15, 2002 *Counsel of Record for *Amicus Curiae*